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ENGLISH FIRST

OUR SYMBOL IS THE STATUE OF LIBERTY TORCH, CAPTURING THE SPIRIT OF IMMIGRANTS WHO LEARNED ENGLISH AND BECAME FULL MEMBERS OF AMERICAN SOCIETY

July 2, 2001

General Services Administration
FAR Secretariat (MVP)
1800 F Street, NW
Room 4035
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ATTN: Laurie Duarte
RE: FAR Case 2001-014

English First and ELPAC are gravely concerned with the potential impact of the *Small Entity Compliance Guide* promulgated by the Clinton Administration with regard to the potential blacklisting of federal contractors for violations of federal laws and policies. The *Compliance Guide,* as drafted, could result in the inadvertent blacklisting of government contractors who violate agency administrative interpretations of federal law which are simply "wrong."

The Equal Employment Opportunity Commission's regulations on language rights and the potential impact of regulations promulgated subsequent to the issuance of Executive Order 13166 are each examples of administrative policies enforced despite repeated instances of judicial review in which the courts have held that those particular interpretations of federal law are in error.

The proposed *Compliance Guide*, as drafted, could have the pernicious result of companies being blacklisted for reasons that courts have consistently rejected. Given the enormous financial implications of debarment of a federal contractor, these high stakes should at the very least mean that such contractors are given the benefit of the doubt, especially when the doubt has been sown by the federal courts.

In sum, our purpose in submitting these comments is to ensure that in two particular instances where federal courts have held underlying agency interpretations of law to be flatly in error, federal contractors are not penalized for abiding by the correct interpretation of those same laws as evidenced by the rulings of federal courts.

I. The EEOC Continues to Enforce a Legal Right to Language Choice

The Equal Employment Opportunity Commission (EEOC) went beyond any previous interpretation of Title VII in its *Guidelines on Discrimination Because of National Origin,* issued in January of 1994. The EEOC insists that company policies which require employees to speak English while on company property violate Title VII of the 1964 Civil Rights Act, which prohibits discrimination based on "national origin."

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In 1993, an English-only rule enforced by a California firm, Spun Steak, was approved by the Ninth Circuit Court of Appeals (the *Spun Steak* case). Hispanic employees of a small meat-product firm were hurling virulent racial insults at their black and Chinese coworkers. The company properly decided to impose an English-only rule for the day shift and a Spanish-only policy for the night shift in order to put a stop to the ethnic slurs.

Premier Operator Services of DeSoto Texas, like Spun Steak, had sound legal reasons for its English-only rules. Employers are required by law to take steps to prevent what is considered a "hostile working environment" and can be held legally responsible for any discriminatory behavior by their employees even if the company was ignorant of that behavior. Insults between coworkers can cost a company a lot of money.

The EEOC filed suit against Premier Operator Services in January 1998. They claimed the company's English-only policy was not a "business necessity." "Business necessity" is another slippery term that tends to mean what some lawyer wants it to mean. For example, Premier Operator Services' English-only rule arguably wasn't necessary because the firm might have hired supervisors fluent in any tongue that any employee preferred to use.

The case went to trial, if a case in which a bankrupt firm offered no defense can be called a trial, this past July. In fact, the only company official to testify did so on behalf of the EEOC. Last September, the former employees of Premier Operator Services were awarded $700,000. This sum more than tripled the EEOC's previous record for damages in a case of this nature, a record established by a consent decree in Illinois earlier that year.

Ida Castro, the EEOC's chairwoman, boasted in a September 19 press release that "this significant ruling serves to remind us that language differences must not make employees the target of . . . even well-intended language policies when there is no real business necessity or justification for such policies."

The EEOC has essentially declared that 'heads, the EEOC wins; tails, the company loses.' Had Premier Operator Services' not taken steps to stop Spanish speakers from calling people names in Spanish, the EEOC could have sued his company for tolerating a "hostile working environment." Because the company did something to stop the name-calling, but imposed a policy with which the EEOC disagreed, his firm was still sued by the EEOC.

This suit was filed despite the fact that every final federal court decision on English-on-the-job rules has held that such rules do not violate Title VII or that the Commission's guidelines are *ultra vires*. To quote just one of the more than a dozen federal courts which have looked at this question: "An agency interpretation, like that in 29 C.F.R. s. 1606.7, **at variance with the statute it interprets**, must be outside the scope of the agency's interpretive authority, and must be **wrong**." *Kania v. Archdiocese of Philadelphia*, 14 F.Supp.2d 730, 735-736 (E.D. Penn. 1998) (emphases added).

This is a very strong denunciation of the Commission's view. A federal court, after substantial review of the evidence and the law, has judicially found that the Commission's

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Guidelines are "at variance with the statute it interprets," are "outside the scope of the agency's interpretive authority" (in other words, *ultra vires* -- beyond its power), and "wrong." The EEOC continues to enforce this regulation anyway.

The EEOC's determination to create a right to language choice in every American workplace means that every actual and potential federal contractor is potentially in violation of this policy and could be blacklisted for failing to obey an agency policy rejected by the federal courts.

II. EO 13166 and Accompanying Regulations Create Right to Services in Every Language

While former President Bill Clinton was flying to Los Angeles for the Democratic convention on August 11, 2000, he took a moment to sign Executive Order 13166. EO 13166 breaks considerable new legal ground, as it is based on the theory that to provide services solely in English could "discriminate on the basis of national origin."

On January 10th of this year, the General Services Administration issued a policy guidance in relation to EO 13166:

> Executive Order 13166 (65 FR 50119) dated August 11, 2000 and policy guidance issued by Department of Justice (DOJ) on August 11, 2000 (65 FR 50123), address the responsibility of all recipients of Federal financial assistance to ensure meaningful access for persons with LEP. GSA refers to and incorporates DOJ's policy guidance for recipients as part of this policy guidance, and for the purpose of determining compliance with this policy guidance, within the scope of Title VI of the Civil Rights of 1964, as amended, its implementing regulations and relevant case law.[1]

Once again, the federal government has chosen to continue to enforce a policy consistently rejected by federal courts. Regulations promulgated pursuant to EO 13166 rely in part on a federal court decision recently reversed by the Supreme Court:

> Most recently, in *Sandoval v. Hagan*, 7 F. Supp. 2d 1234 (M.D. Ala. 1998), affirmed, 197 F.3d 484, (11th Cir. 1999), petition for certiorari granted, *Alexander v. Sandoval* 121 S. Ct. 28 (Sept. 26, 2000)(No. 99-1908), the Eleventh Circuit held that the State of Alabama's policy of administering a driver's license examination in English only was a facially neutral practice that had an adverse effect on the basis of national origin, in violation of Title VI. The court specifically noted the nexus between language policies and potential discrimination based on national origin. That is, in *Sandoval*, the vast majority of

[1] General Services Administration, Office for Civil Rights, "Title VI of the Civil Rights Act of 1964; Limited English Proficiency Policy Guidance for Recipients of Federal Financial Assistance," *Federal Register*, January 17, 2001, (Volume 66, Number 11), pp. 4026-4032.

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individuals who were adversely affected by Alabama's English-only driver's license examination policy were national origin minorities.

On April 24, 2001, the Supreme Court reversed the *Sandoval* decision (*Alexander v. Sandoval* (99-1908)). *Sandoval* was the first federal case to specifically equate language and national origin. In doing so, the lower court ignored the Supreme Court's careful and limited reading of the phrase "national origin" in *Espinoza v. Farah Mfg. Co.* 414 U.S. 86 (1973).

The Fifth Circuit has held that "the EEO [Equal Employment Opportunity] Act does not support an interpretation that equates the language an employee prefers to use with his national origin." *Garcia v. Gloor* 618 F.2d 264, 270 (5th Cir. 1980), cert. den.,449 U.S. 113 (1981). Similarly, the Second Circuit has said "Language, by itself, does not identify members of a suspect class." *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983), cert. den. 466 U.S. 929 (1984).

In addition, the Second, Sixth, Seventh and Ninth Circuits have found no requirement for government examinations, services or notices to be in languages other than English. *Toure v. United States*, 24 F.3d 444, 446 (2nd Cir. 1994)(rejecting request for multilingual forfeiture notices); *Frontera v. Sindell*, 522 F.2d 1215, 1220 (6th Cir. 1975)(upholding English-language civil service examination, "In conducting the examination in English, the Commission violated no constitutional or civil right of Frontera"); *Nazarova v. INS*, 171 F.3d 478, 483 (7th Cir. 1999)("It has long been established that due process allows notice of a hearing (and its attendant procedures and consequences) to be given solely in English to a non-English speaker"); *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973)(rejecting a claim for Spanish-speaking interpreters and permitting English language benefit termination notices).

Despite this solid record, EO 13166, as interpreted by the Office of Civil Rights in the Department of Justice, requires every recipient of federal funds, including "a federally assisted zoo or theater... to take reasonable steps to provide meaningful opportunities for access" by Limited English Proficient (LEP) individuals.

The U.S. Department of Justice Civil Rights Division's *Title VI Legal Manual* notes that federal contracts are also legally federal assistance:

> The most clear means of identifying a "recipient" of Federal financial assistance is to determine whether the entity has voluntarily entered into a relationship with the Federal government akin to a contract and receives Federal assistance under a condition or assurance of compliance with Title VI (and/or other nondiscrimination obligations)[2]

Federal contracts can potentially impose considerable requirements on every aspect of the corporation's operations:

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[2]http://www.usdoj.gov/crt/grants_statutes/legalman.html#Contract

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> The CRRA [Civil Rights Restoration Act] also defines "program or activity" to include certain private entities. The scope of "program or activity" as it applies to a corporation or other private entity depends on the operational purpose of the entity, the purpose of the funds, and the structure of the entity. Title VI provides:
>
> For the purposes of this subchapter, the term "program or activity" and the term "program" mean all of the operations of--
>
> (3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--
>
> (i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
>
> (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
>
> (B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; *any part of which* is extended Federal financial assistance (emphasis in original).[3]

What might these "reasonable steps" now required to provide equal access to non-English speakers consist of? Walter Olson's book on employment-discrimination law, *The Excuse Factory*, reported that one activist from Yale actually suggested that America must accommodate "difference of speech" by "forcing employers to hire supervisors familiar with the languages their workers wish to speak in and banning the practice of preferring workers with readily understood accents."

The track record of the civil-rights industry and its allies in government suggests more good reason for concern. The Americans with Disabilities Act has provoked litigation over golfers, alcoholic airline pilots and half-blind truck drivers. A Rand Corporation study found that an employer can expect to spend $12,000 or more defending against these frivolous lawsuits.

Those incorrigible optimists who think translating a few documents into Spanish or Chinese will satisfy this requirement should take note. According to the Justice Department guidelines which were incorporated into the GSA Policy Guidance), if English speakers can talk to a clerk in the personnel office, persons who speak any other language must have the same opportunity:

> [A] recipient's obligation to provide meaningful opportunity is not limited to written translations. Oral communication between recipients and beneficiaries often is a necessary part of the exchange of information. Thus, a recipient that

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[3]http://www.usdoj.gov/crt/grants_statutes/legalman.html#Corporations

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limits its language assistance to the provision of written materials may not be allowing LEP persons "effectively to be informed of or to participate in the program" in the same manner as persons who speak English.

The Clinton-Gore Administration magnanimously allowed the subject of cost to be raised as a defense. However, "claims of limited resources from large entities will need to be well-substantiated." In other words, good luck. Cost, even extravagant cost, has seldom proved a successful defense in civil-rights cases.

The impact and cost of these new rules will not just fall on places one tends to think of as immigration centers since "programs that serve a few or even one LEP person are still subject to the . . . obligation" (emphasis added). There are at least 300 languages spoken in our land. Few government contractors are ready to provide all services in every one of those tongues.

EO 13166 is an open invitation for all sorts of litigation. The Montefiore Family Health Center in the Bronx section of New York City has come under the scrutiny of the U.S. Department of Health and Human Services Office of Civil Rights for failing to have a Khmer translator on the premises 24 hours per day, seven days per week.

The Maine Medical Center, based in Portland, now has nine official tongues and counting. By comparison, the United Nations attempts to function in but six official languages.

Under a July, 2000 settlement between the Maine Medical Center (MMC) and the Office of Civil Rights of the Department of Health and Human Service (HHS), the Maine Medical Center must post a "Interpreter Availability Sign" to be "printed at least in English, Farsi, Khmer, Russian, Serbo-Croatian (Cyrillic and Roman alphabets), Somali, Spanish and Vietnamese."

There is more to this settlement. Hospital personnel must be "inform[ed] that MMC's policy of providing in-person and telephone interpreter services to LEP [Limited English Proficient] persons is not limited to languages in which [the Interpreter Availability Sign] and other documents are printed." In other words, anyone who arrives at the front desk claiming to speak any language in the world has an unlimited claim for translation services.

In fact, the Maine Medical Center is to "always have in place policies and procedures . . . designed to enable effective communication with LEP persons, in languages they can understand, in MMC's programs and activities, during all hours of their operation, at every MMC location covered by this Agreement." Clearly, any attempt by the hospital to impose a rational limit on translation costs will only invite further litigation.

The question of the legal implications of inaccurate or arguable translations has not been resolved. Yet, anyone who has attempted to translate materials from one language to another knows that mistakes are inevitable and important nuances can be overlooked.

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This question of government translation error is hardly theoretical. In 1994, the New York Times reported that in New York City election "ballots last year, the city erroneously printed the Chinese character for 'no' as a translation for the English word 'yes.'"

HUD spokeswoman Ginny Terzano resorted to blaming errant subcontractors for the agency's infamous Haitian Creole pamphlet, Rezedents Rights and Rispansabilities (signed by "Sekretary Andrew M. Cuomo fella") since "we don't translate and we don't print."

Actual and potential federal contractors will not be able to resort to this excuse. The Maine Medical Center was required to be responsible for the accuracy of all translations:

When MMC staff have reason to believe that an interpreter from a professional agency, a telephone interpreter service, its bilingual staff or MMC's interpreter list is not qualified or properly trained to serve as an interpreter, or is hampering effective communication between MMC staff and a LEP person, MMC shall obtain another interpreter.

If a staff member does not speak language being translated, precisely how is he to evaluate the accuracy of that translation? The short answer is, he can't. But there will be plenty of lawyers who will be glad to "help."

The potential translation cost implications of EO 13166 on every aspect of a federal contractor's business are enormous, even if no complaint is ever filed. The New York Times recently reported on the economics of translation:

> Proficient translators and interpreters — most of whom are freelancers — can make a pretty good living. Salaries for the State Department's 20 staff interpreters range from $70,000 to $100,000 a year; freelancers get about $430 a day for conferences and up to $300 for classes. Most translation companies pay 5 cents a word for widely spoken languages like Spanish, up to 20 cents a word for character-based languages like Japanese. A 1998 survey by the translators association showed that freelance translators made about $51,848 a year, while salaried translators averaged $44,939. But most experts say that efficient freelancers can make six figures, and that project managers — the salaried people who coordinate translation assignments — can hit $90,000.[4]

The combined impact of the EEOC's language policy and the regulations created by EO 13166 ensures that every federal contractor will be in violation of this new language policy at some point, and thus subject to the blacklisting rules.

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[4]"Workplace: Translators Thrive as the World Speaks," *New York Times*, May 30, 2001

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Accordingly, until the EEOC changes its language policy and EO 13166 is repealed, we strongly urge the blacklisting policy be reevaluated and modified.

Sincerely,

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